

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 30, 2006

**STATE OF TENNESSEE DEPARTMENT OF
CHILDREN'S SERVICES v. D.A.B.
In the Matter of: D.A.E.**

**Appeal from the Juvenile Court for Knox County
No. 67018 Tim Irwin, Judge**

No. E2006-01490-COA-R3-PT - FILED DECEMBER 15, 2006

The State of Tennessee Department of Children's Services ("the State") filed a Petition to Terminate Parental Rights of D.A.B. ("Father") to the minor child D.A.E. ("the Child"). The case was tried and the Juvenile Court entered on order finding and holding, *inter alia*, that clear and convincing evidence existed to terminate Father's parental rights to the Child under Tenn. Code Ann. §§ 36-1-113(g)(1), (g)(2), and (g)(3), and that termination was in the best interest of the Child. Father appeals claiming that the Juvenile Court erred both in finding that grounds for termination existed and that termination was in the Child's best interest. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court
Reversed, in part; Affirmed, in part; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Ben H. Houston, II, Knoxville, Tennessee for the Appellant, D.A.B.

Michael E. Moore, Acting Attorney General and Reporter, and Lauren S. Lamberth, Assistant Attorney General, for the Appellee, State of Tennessee Department of Children's Services.

OPINION

Background

The Child, who was born premature in April of 2001, has cerebral palsy and spent a large portion of the first year, to year and a half, of his life in and out of Children's Hospital. In 2002, the Child was hospitalized and had a G-tube inserted so the Child could be fed. Father took the required hospital class on G-tube feedings. Father initially visited the Child at Children's Hospital, but soon was banned from Children's Hospital premises after allegedly making threats to blow up the hospital. The Child's mother ("Mother") rarely visited the Child in the hospital¹. In late 2004, the Child was hospitalized and diagnosed with severe failure to thrive. As a result of this diagnosis, the State was granted custody of the Child in December of 2004.

On July 8, 2005, the State filed a Petition to Terminate Parental Rights ("the Petition") of Father to the Child under, among other things, Tenn. Code Ann. §§ 36-1-113(g)(1), (g)(2), and (g)(3). On April 20, 2006, the State filed a Supplement to Petition to Terminate Parental Rights ("Supplemental Petition") seeking to add as an additional ground for termination under Tenn. Code Ann. § 36-1-113(g)(1) Father's alleged willful failure to visit the Child for four consecutive months prior to the filing of the Supplemental Petition. Father filed a motion to dismiss the Supplemental Petition claiming, in part, that the filing of the Supplemental Petition only one week before trial gave him inadequate notice of the newly alleged ground for termination and, therefore, violated Father's due process rights. The Juvenile Court denied Father's motion to dismiss the Supplemental Petition. The case was tried without a jury in April of 2006.

Sarah Cormier, a Child & Family Specialist with Holston Foster Care, testified at trial. Ms. Cormier testified that she oversees children in custody and assists with their permanency plans. Ms. Cormier worked on the Child's case from December 14, 2004, through March 1, 2006. She testified that during this time she saw the Child weekly and oversaw supervised visits with the parents.

Ms. Cormier testified about the Child's condition when he came into foster care stating:

He was severely malnourished, very - - you know, I talked about seeing him in the hospital the very first intake and he looked like a primate, you know, just had no response, no affect, he was just very needy at that point of any kind of human contact, and just really very severe.

¹The record reveals that Mother voluntarily surrendered her parental rights to the Child. The record further reveals that Mother's husband, the Child's legal father based upon their ongoing marriage, also voluntarily surrendered his parental rights to the Child. Mother and her husband are not involved in this appeal.

Ms. Cormier also testified that the Child has a sensory integration problem and stated:

I think in the beginning of care he was very resistant to sensory touch. He almost looked like an Asperger child that had difficulty with any kind of tactile, you know, touching. He was in rehab. I think that they were beginning to be able to address those sensory difficulties.

Ms. Cormier testified about the visits she supervised between Father and the Child. Ms. Cormier described Father's interaction with the Child during these visits stating:

It was very much like, I guess, a playmate. You know, we met initially at Burger King on Chapman Highway just because there was a playland, so that was available to the child so he could have some activity there. The visits, you know, started off with a lot of playing, a lot of interaction. As they progressed - - and I'm guessing this was in February of '05. [The Child] began to exhibit really stressful behaviors such as being really fussy, he was grinding his teeth when he returned home from these visits, and just really experienced some stress.

Ms. Cormier further testified that in the beginning, the Child seemed to recognize Father, "but as the time went on the recognition was less and less." Ms. Cormier testified that Father never inquired of her about the Child's medical status, his therapy, or how the Child was doing in the foster home. Ms. Cormier testified that the Child is fed partially through a G-tube and partially by mouth and that Father never fed the Child during any visits.

When Ms. Cormier was asked how the Child's condition has improved between the time she first saw him and the time she last saw him in March of 2006, she stated: "Oh, wow, speaking like maybe 30 words, being able to sign 20 different, you know, sign language signs. He was happy, joyful, you know, just very bonded with his caretaker, you know, just a really well-developed little guy, I mean really coming along and was very secure."

Courtney Steere, who has been the Child's case manager since March 23, 2005, also testified at trial. Ms. Steere testified:

[the Child] just turned five years old. He has made a lot of progress since we came into custody. When he came in he couldn't walk, couldn't talk. Now he's talking. He has a vocabulary of about 20, 25 words, but he can mimic any words that you say and is starting to put three- or four-word sentences together. He is running around, playing, laughing, just turning into a healthy little boy."

Ms. Steere also testified about the requirements in the permanency plan prepared for the Child ("the Plan"). The Plan required, among other things, that Father attend therapy as recommended; obtain and understand information regarding the Child's intensive physical, occupational, and speech therapy; understand the Child's special needs and how to care for the

Child; obtain reliable transportation; notify the Child's case manager of any changes in Father's phone number, address, or employment; and pay child support for the Child.

Ms. Steere testified that the Department of Children's Services set up a diagnostic psychiatric interview for Father with a doctor. Father attended this appointment, and the doctor then recommended various things Father needed to accomplish. Ms. Steere testified that the doctor's recommendations were very similar to the tasks required of Father under the Plan.

Both the Plan and the doctor's recommendations required Father to participate in and progress in anger management classes by accepting responsibility for his anger problems. Ms. Steere testified that Father has not completed anger management classes. She testified that Father did attend some anger management sessions, but was dismissed from the program in March of 2006, for his failure to accept responsibility for his anger. Further, Ms. Steere testified that Father did not attend any therapy as was recommended by the doctor. Ms. Steere testified that "[Father has] never given an explanation for not completing [the doctor's recommendations]. It's always, I'm going to be completing them, I'm going to be doing this."

Ms. Steere also testified that Father has not obtained information regarding the Child's condition and therapies. The burden of finding classes where he could obtain information regarding the Child's condition and therapies was placed upon Father under the Plan because the Child was receiving therapy at a Children's Hospital facility and could not obtain the same services at any other nearby facility, and Father, due to his own actions, was banned from Children's Hospital premises and not allowed to attend classes there.

Ms. Steere testified that the Department of Children's Services attempted to assist Father with transportation by obtaining bus passes for Father who has no other transportation.

Ms. Steere testified that she explained to Father that he was to display stability by maintaining a permanent address for at least six months, and that Father has failed to complete this requirement. Ms. Steere testified that when she initially took over the Child's case, Father reported to her that he had no place to live. She testified that Father told her that he was not allowed to go back to the Rescue Mission where he had been staying. Ms. Steere testified that on June 22, 2005, Father reported to Ms. Steere that he was living with Nancy Shropshire and that he was working for Ms. Shropshire by watching her two children while she worked third shift. Ms. Steere testified that on July 13, 2005, Father reported that he no longer was living with Ms. Shropshire and gave an address of 2716 Blossom Avenue. Ms. Steere testified:

I was never able to confirm that there was a Blossom Avenue. He reported to me later that he just said that because [Mother] was at the meeting at the time and he did not want her knowing that he was living with Nancy. So evidently he was still living with Nancy at this time.

Ms. Steere testified that she did a home visit in October of 2005, to Nancy Shropshire's home and learned that Ms. Shropshire still was married to Mr. Shropshire. Ms. Steere testified that in November of 2005, she was informed by one of Ms. Shropshire's relatives that Father was no longer living with Ms. Shropshire. Ms. Steere testified that it was reported to her that Father was staying at Mother's home at that time. On January 18, 2006, Father called Ms. Steere to report he was moving into a duplex on Cavalier Road. Ms. Steere testified that she did a home visit on February 8, 2006, and could see by looking in the windows that the duplex was "totally vacant." Ms. Steere testified: "The very next day [Father] said he had not moved into the residence yet because he owed money for KUB. He said he's living with a friend, Tyrell, but refused to give me the address."

Michelle Cox, an occupational therapist with Kids Rehab, testified regarding therapy she provided to the Child prior to the Child coming into State custody. Ms. Cox provided therapy for the Child in the home twice a week starting in February of 2004, and ending in April of 2004. Ms. Cox explained the therapy she rendered stating:

Occupational therapy for children involves working with their developmental delays. Occupational therapy in particular works with fine motor delays, bilateral hand coordination, self-feeding, self-dressing, anything that a child would do in their day, I teach them to do. And a big part of children's world is play, and if they don't know how to play, they can't interact with other children.

Ms. Cox testified regarding her visits to the Child's home. She testified:

Usually one of the other children besides [the Child] would answer the door. We contacted through a lady named Valerie that worked at McDonald's; we had a cell phone number. And she would always know that we were coming; she might not be off work then, but she knew that we were going to come. The children would be present in the living room, and we were always told that Mother was asleep in the bedroom. So I really interacted most of the time with the little ones.

Ms. Cox testified that she never met Mother and although she saw Father in the yard working on a car several times, she "never formally met him." Ms. Cox testified that Father never came into the house to work on the therapy with them and never asked what she was doing with the Child or how to assist.

Ms. Cox testified regarding the skills she worked on with the Child stating:

When I was in the home with [the Child] we were working on sitting balance. He was right at three years old and was not sitting. He was scooting along the floor, so we would work just on sitting up, and then we would try to do activities that were on the floor, such as ring stackers, putting pegs in peg board with him maintaining that sitting balance, just general age-appropriate play for a two- or three-year-old.

When asked about the progress of her therapy, Ms. Cox testified:

It was very hard. The other children that were in the room thought that I was Christmas. I would bring in my bag of toys so I was constantly getting them out of my toys while I was working with [the Child]. And it was very slow progress. We did make some, but because there was no carry-over, we did not get maximum benefit.

Ms. Cox also testified about the general condition of the home stating:

The home was very dirty. We called it one of our blanket homes, which we would carry a blanket with us. If the floor was unsuitable or unsanitary, we would spread a blanket. The couch was - - the cushions were on the floor because the couch had broken through. We would go into the kitchen to get baby food, and there were roaches everywhere, food on pans that had probably been left at least a week because mold was growing on them. At one time they had puppies in the kitchen. There were about 13 puppies crawling around, defecating everywhere. It was bad just in general.

The woman who has been a foster parent for the Child since December of 2004, when he first came into State custody, testified at trial. She was identified for the record as Mrs. Foster. Mrs. Foster testified that at the time the Child came into State custody, he was three years and eight months old and weighed twenty pounds. Mrs. Foster described the Child at that time as “[v]ery under weight, like a flat affect, no emotion, didn’t walk, didn’t talk, could not crawl, could scoot a little bit but couldn’t really stand very long, couldn’t pull himself up.” Mrs. Foster testified that at that time, the Child was wearing a size 18 month old clothing.

Mrs. Foster testified that in the beginning, she took the Child to Children’s Corner rehab three days a week for the first two weeks and then five days a week thereafter. She testified that she attended rehab with him to learn all of the training. Mrs. Foster testified that the Child received physical therapy, occupational therapy, and speech therapy every day, and stated that the therapy was designed to teach the Child: “The basics, to communicate, to walk, to crawl, just to learn about toys, how to stack blocks, just a lot of fine motor skills, plus gross motor skills.” Mrs. Foster testified that she

had to learn all of the different exercises. We had to do what they call brushing every two hours because he wasn’t used to being touched. He can’t stand to be touched, you know, for anyone to touch him. We did joint compression every two hours at home and there to get him used to having weight on his legs and major joints of the arms to teach him to crawl; plus all of his tube feedings, which is every three hours six times a day.

When asked about the Child's current daily regimen, Mrs. Foster testified:

It's slowed down a little bit. He attends PT and OT three times a week now and speech, plus his feeding class once a week. We don't have to do the brushing any longer because he can stand to be touched, like to be washed and just common touching, what should be normal. We still have the two feedings every three hours. We start at 6 in the morning, and we don't finish until 9 at night.

Mrs. Foster described a typical day stating:

I get up about 5 or 5:30 to get prepared for his day. Then we start at 6:00 a.m., his first tube feeding. And he is still incontinent, he wears diapers, so we're cleaning and changing him at that time. After his first round of feeding, it takes about 45 minutes to an hour, we are doing the bathing, dressing, trying to get him to do what he can for himself, you know. He can pull his pants up, but he can't put them on his legs, you know.

Then depending on what day of the week it is, Mondays we have occupational therapy and then feeding class for about an hour and a half after. And then we still have our tube feedings in between all of this. We go home, tube feedings, I will work with his therapies, his language skills. The teachers from Fort Sanders send me a list home to work with him, sign language we work with, and that's goes on all day. He takes a nap, more tube feedings, and then we do the bedtime ritual of getting him ready for bed, then his last tube feeding.

Mrs. Foster testified that the Child sees a pulmonologist for his lungs, a GI doctor for his stomach, a primary care doctor, Dr. Weinstein for psychiatry, an ENT doctor, and an ophthalmologist.

Mrs. Foster testified about how the Child has changed since he first came to her home. She testified that when he came to her home, the Child couldn't communicate, but now he has a vocabulary of 30 to 50 words and about 20 different sign language signals. Mrs. Foster further testified that the Child never smiled or cried when he first came to live with her, but now

he's happy, he laughs, he runs and plays, he is very active, he's into everything, he's playing Little League Challenger Division baseball, he is just very active. He loves to swim. We go swimming. That's an activity that we added ourselves for his physical therapy. He shows every emotion a child would, much less in his age. I mean he's five, but he's more maybe at a two-year old level with understanding.

Mrs. Foster testified that when the Child came to live with her he weighed only 20 pounds and he now weighs 40 pounds, and stated: "He's right at the norm"

Mrs. Foster testified that she and her husband want to adopt the Child. When she was asked if the Child would continue to have communicative and cognitive deficiencies due to his cerebral palsy, Mrs. Foster replied: "That's a possibility, but there is still a lot of room for improvement at this point and stage."

Buddy Williams, the Security Manager for Children's Hospital, testified that Father is not allowed at Children's Hospital and explained:

when his child was in the hospital, [Father] would walk around the floors, on floors that he did not belong. He was constantly asking the staff for dates, other family members, staff. I mean other family members, he was asking them out. He was visiting rooms without the patient's family's permission. He was on several of the floors checking door knobs and was seen by other hospital employees.

The incident that caused me to ask him to leave the premises and not return, he was at our smoking area where family members and employees go to smoke, and he had taken a little white baby sock and put matches around it,

Mr. Williams testified that when he talked to Father about this incident "[Father] just said it was something that he just made and he was just playing around."

Father testified at trial. Father testified he currently is living with friends and when asked the address, Father stated: "It's off of - - I don't remember the current address exactly of the street, except for Lay Avenue." Father testified that in January of 2006, he moved to 2442 Cavalier, but that he moved out approximately two months later in March because "Cavalier is in a spot or a location that I didn't think was suitable for my child to be living or raised at. Only the simple fact is in that particular location the gang activity and crime rate is way upstanding too high." When asked if he is trying to find new housing, Father stated: "As a matter of fact I was looking at an apartment that I'm trying to consider to get into." When Father was asked where he has been living, he testified that he receives his mail at Mother's house, and that he spent the last couple of nights at a friend's house. Father further stated: "I jump between houses."

Father was questioned about the incident resulting in his being banned from Children's Hospital. He testified:

I was at the smoking area while my child was in the hospital, smoking a cigarette, and I have a habit of picking strings. It's a nervous habit I do when I'm nervous, board (sic), stuff like that to try to keep me calm in situations and I also do that - - I mean, at the time I had a milk and a sock, and I was just sitting there unraveling it around a milk carton, just for the simple fact of trying to calm my nerves.

When he was asked if this incident was misunderstood as his attempt to make a bomb, Father replied:

Yes. When [Officer] Buddy [Williams] came to me about this incident, about me making a bomb, to me I didn't see the relevancy in a carton and a sock as a bomb. Especially after the fact of the 911 thing that seriousness of this incident would probably have come to a lot more great measures.

Father was asked about why he reported during his psychological assessment that he was kicked out of Children's Hospital because the security guard did not like him and Father stated:

In my best knowledge I believed that had something to do with it. I mean, I understand that, yes, because after the 911 thing that a bomb threat is considered serious, but didn't think that him using that as a guide to kick me out because of the fact of him having no grounds didn't seem to be an adequate reason.

Father, however, admitted that he "had a couple of confrontations" with the nurses at Children's Hospital.

Father testified that when the Child was released from the hospital, Father went home with him "for probably about maybe a month" and then

I was in and out of the house from then until [the Child] was taken merely because me and [Mother's] relationship issues were causing a lot of problems. [Mother] has some issues that was addressed to her about her controlling facts and she would try to control a relationship, and I would try to dispute the acts and also the fact that when me and her would talk about our children, we had different opinions on how we would raise our kids and she would reject some of my opinions.

At that time, Father lived with Mother, Mother's husband John, John's girlfriend, and several children.

From the time the Child was born until the time that Father was banned from Children's Hospital, Father spent more time with the Child than Mother did. Father is the one who learned how to care for the Child during the Child's hospitalizations. Mother almost never came to the hospital to visit the Child. Father admitted that he knew when he was banned from Children's Hospital that Mother did not know how to care for the Child and that if he was going to be able to take care of the Child he had to be extra careful. However, Father stated: "I wasn't able to [be extra careful because] ... I was in jail all the time." Father testified:

When [the Child] got released from the hospital and I was kicked out of the hospital at that particular time and then [the Child] was released, it was kind of like a roller coaster ride. I mean I couldn't tell you exactly how long I stayed in that household [with Mother and the Child]. If I was watching television at any given point in time, more than likely by the end of that day I was in jail....Because if somebody tells you, okay, you either choose between living with your child or doing what they say,

usually you start doing what they say. But if you start to be the rebellious and they tell somebody else, well, because of the fact, that I believe, that men have a reputation and women and statutes of violence and hitting them and stuff like that, they can tell a judge or an officer even without the likely of proof that he hit me, and you'd be in jail by that morning.

Father admitted that he was in and out of jail a lot. He testified that after being in jail:

I would come home, I would stay two, maybe three weeks, maybe a month until another incident apprised, and I'd be back in jail again. I'd be in jail, staying at the mission, trying to get my way back in so I could be with my kids because I believe that a father is not somebody who is a weekend daddy. If you have a child, you don't betray that child. You're there through thick and thin. Whether you like the situation you're in or not, I believe you're there. A father to me is not somebody who pays child support and sees the child on a weekly basis.

Father admitted that after the Child was taken by the State, Father pushed Mother and broke her ribs, and that he went to jail for that. Father admitted that Mother has an order of protection against him as a result of this incident.

Father admitted that he has not completed anger management classes and that he is not currently participating in any anger management classes. He further admitted that he reported during his psychiatric assessment that he got a gun and was going to go after Mother when he found out that another child of his had been taken into State custody, but that a friend stopped him from going to Mother's house. Father testified:

I don't think I would have actually done anything. To me, I'm not really a violent person; I don't try to be violent with people. And it upset me, yes. But from the time that I would have drove there, the time I would have drove over there, I don't think I would have proceeded in anything.

Father admitted that he reported during his psychiatric assessment that he scares himself when he gets upset and that in the past when he has been angry he blacked out and didn't know what he was doing. Father also admitted that he reported that he once had stabbed someone six times when he was angry and was arrested for that incident. Father admitted that he has been in jail more times than he can remember for domestic violence, aggravated assault, and driving on a suspended license.

When asked about whether he thought he has an anger management problem, Father stated: "Partially I don't. I mean, I don't believe I do, no." Father further stated:

I went to jail for aggravated assault, yes, in trying to protect myself. I don't believe that's an anger problem. I mean, you defend yourself, that's not an anger problem.

Domestic violence, if you're watching television and somebody says, no, and they call the police and you go to jail, that's not really an anger problem.

When asked about his refusal during anger management classes to accept responsibility for his actions, Father testified:

That's because he wanted me to admit that I had faults in all of these cases, and I can't say that I have fault in these. I mean, I do have faults, yes. I did break her ribs; that was wrong of me. But as for going to jail on several different occasions or for the one for aggravated assault, I mean, that's not an anger problem; that's for, one, self defense and for, two, watching television.

Father admitted that he does not have a valid driver's license because his "was suspended several years ago for non-payment of fines." However, Father testified: "In the beginning [when the Child was first taken into State custody] I was able to - - I was visiting [the Child] on a regular basis, illegally driving without a license, or Ms. Nancy had taken me to a few of them."

Father testified that he learned about how to care for the Child before Father was banned from Children's Hospital and even took the required hospital G-tube feeding class. However, Father admitted that he does not know about any of the therapies or exercises that the Child currently is doing. Father testified that he knows sign language because "I used to be deaf."

Miriam Lynn Weinstein, M.D., a specialist in pediatric rehabilitation, testified by deposition. Dr. Weinstein testified that because the Child was born prematurely with cerebral palsy and developmental delay, she has been treating him for his entire life. Dr. Weinstein testified that she prescribed therapy for the Child, but that the Child's family was not compliant with bringing the Child to the therapy appointments on a consistent basis. As a result, Dr. Weinstein arranged for the Child to receive in-home therapy. Dr. Weinstein testified regarding the importance of early therapy stating:

the brain is most plastic when the child is in the first year of life. If we can do therapy with that child, to get that child to have less tone and less posturing and to do things that it should be doing developmentally, like rolling over and bearing weight on its arms, and also things it's supposed to learn to do with its hands, and speech, if that's indicated as they get a little older, work on those kinds of things.

And to also train the family to work on those things, because it's really important that - - in fact, we get our best outcomes if what we do is combined with a family program. So that combination.

Dr. Weinstein testified that speech therapy for infants is related to feeding. Dr. Weinstein testified:

when a child doesn't get feeding therapy in a timely fashion when they are an infant, and they get an aversion to having anything in their mouth, that's very hard to overcome.

And that's [the Child's] reason for having feeding difficulties now. He doesn't have mechanical problems with swallowing or chewing. He has problems with being willing to have anything near his mouth.

Dr. Weinstein testified that she first sent the Child to Children's Rehab several times a week, and when there was a problem with his attendance, she switched the Child to a day-long inclusive program at Children's Corner. However, because the Child's family still did not get the Child to his appointments at Children's Corner, Dr. Weinstein switched the Child to the in-home therapy program. Dr. Weinstein testified that she "explained to the family several, several times, not taking advantage of that window when the brain is the most plastic means that you're going to sacrifice the child's best chance at having an optimal outcome in terms of function." Dr. Weinstein testified that she spoke with the Child's mother during the Child's hospital admission post-birth and then almost always spoke to Mother's husband, John, regarding the Child. Dr. Weinstein does not remember ever talking to Father.

Regarding the Child's specific therapy, Dr. Weinstein testified:

I felt that if we didn't do it he wasn't going to walk, wasn't going to talk, he was going to be very low functioning.

But if we did do it, he had a very good chance to walk, to talk, to be reasonably functional. So I felt like the stakes in this child's case were particularly high.

When asked what the difference would be if a child's family is involved or not involved in therapy, Dr. Weinstein stated: "It's dramatic. It's - - it can often be the difference between whether the child will achieve some of the milestones like walking, communicating, or not." Dr. Weinstein testified that not having the therapy done on a regular, several times a week basis has had "a very serious impact on this child." Dr. Weinstein testified that the fact that the Child's family was not compliant with therapy and the Child did not get the prescribed therapy

when he was really little, mean that his qualities of balance and coordination and movement are never going to be as good as they would have been if he had had that help from the get-go.

And I believe that his cognitive abilities are not going to be as good as they would have been if he had gotten that intensive help from the get-go.

When asked what the Child's family needs to do to facilitate his therapy and his improvement, Dr. Weinstein stated:

Well, besides just getting him there consistently week in and week out, they have to do a whole bunch of hands-on work with him to stimulate him, to get him to understand cause and effect, to do hands-on therapy, to work on balance, to work on interaction with toys, to work on fine motor skills.

There is just a wide range of daily activities that they have to do to help this child get to where he is now.

Dr. Weinstein testified that currently the Child still is getting a fairly intensive program of therapies and that she plans to add another type of therapy in the near future to his regimen.

After trial, the Juvenile Court entered its Termination of Parental Rights and Final Decree of Guardianship on May 12, 2006, terminating Father's parental rights to the Child and finding and holding, *inter alia*:

V
* * *

2. The Court finds that this child was found to be dependent and neglected by this Court and was placed in the custody of the Department of Children's Services; the child's situation prevented reasonable efforts to assist [Father] to establish a suitable home for the child for a period of four (4) months following the removal, but [Father] had made no reasonable efforts to provide a suitable home and has demonstrated a lack of concern for the child to such a degree that it appears unlikely that he will be able to provide a suitable home for the child at an early date.

3. This child has been removed by order of this Court for a period of six (6) months; the conditions which led to his removal still persist; other conditions persist which in all probability would cause the child to be subjected to further abuse and neglect and which, therefore, prevent the child's return to the care of [Father]; there is little likelihood that these conditions will be remedied at an early date so that this child can be returned to [Father] in the near future; the continuation of the legal parent and child relationship greatly diminishes the child's chances of early integration into a stable and permanent home;

4. And as final grounds for termination, the Court finds that [Father] has failed to comply in a substantial manner with those reasonable responsibilities set out

in the foster care plans (aka permanency plans) related to remedying the conditions which necessitate foster care placement.

VI

1. [Father] has failed to make such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in his home after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible. He has less ability to care for this child now than he did at the time of the child's removal. This Court has grave concerns about his ability to even take care of himself. He has no home, no understanding of the child's needs, and no time to commit to the child's care. He has not maintained regular visitation or other contact with the child and the child's meaningful relationships are now with his foster parents. A change of caretakers and physical environment is likely to have a devastating impact on the child's emotional, psychological and medical condition. [The Child] has made amazing progress in the home of his foster parents. According to Dr. Weinstein, there is not one aspect of development this child is not doing remarkably better now. [Father] has shown severe neglect toward the child. He has been arrested more times than he can remember for acts of violence and has been dismissed from therapy to address that behavior due to his failure to take any responsibility for his actions....

2. Parental rights of the child's mother and her husband (the child's legal father based upon ongoing marriage) have been surrendered.

3. The Department of Children's Services has made reasonable efforts toward achieving permanency for this child.

4. [The Child] suffered permanent impairment due to his father's neglect. Even the best care now will not compensate for that lost time. But he is getting the best care now. He is entitled to a safe, secure and loving home with adults who will provide the consistent, intensive care he needs for optimal progress. That home is available to him through adoption by his present foster parents.

5. It is, therefore, in the best interest of [the Child] and the public that all of [Father's] parental rights to this child be terminated and the complete custody, control, and full guardianship of the child be awarded to the State of Tennessee, Department of Children's Services, with the right to place him for adoption and to consent to such adoption in loco parentis.

Father appeals to this Court.

Discussion

Although not stated exactly as such, Father raises six issues on appeal: 1) whether the Juvenile Court erred in finding clear and convincing evidence existed to terminate Father's parental rights based upon grounds alleged in the Supplemental Petition filed only one week before trial; 2) whether the Juvenile Court erred in finding that clear and convincing evidence existed to terminate Father's parental rights under Tenn. Code Ann. § 36-1-113(g)(1) for willfully failing to support or willfully failing to make reasonable payments toward the support of the Child; 3) whether the Juvenile Court erred in finding that the State made reasonable efforts to reunite Father and the Child; 4) whether the Juvenile Court erred in finding clear and convincing evidence existed to terminate Father's parental rights under Tenn. Code Ann. § 36-1-113(g)(2); 5) whether the Juvenile Court erred in finding clear and convincing evidence existed to terminate Father's parental rights under Tenn. Code Ann. § 36-1-113(g)(3); and, 6) whether the Juvenile Court erred in finding that it was in the best interest of the Child to terminate Father's parental rights.

Our Supreme Court recently reiterated the standard of review for cases involving termination of parental rights. According to the Supreme Court:

This Court must review findings of fact made by the trial court *de novo* upon the record "accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). To terminate parental rights, a trial court must determine by clear and convincing evidence not only the existence of at least one of the statutory grounds for termination but also that termination is in the child's best interest. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (citing Tenn. Code Ann. § 36-1-113(c)). Upon reviewing a termination of parental rights, this Court's duty, then, is to determine whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.

In re F.R.R., III, 193 S.W.3d 528, 530 (Tenn. 2006).

The relevant statutory sections addressing the grounds upon which the Juvenile Court terminated Father's parental rights are found in Tenn. Code Ann. § 36-1-113(g). These sections provide that the following are grounds for terminating parental rights:

- (1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;
- (2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency

plan or a plan of care pursuant to the provisions of title 37, chapter 2, part 4;

(3)(A) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(i) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

Tenn. Code Ann. §§ 36-1-113(g)(1), (g)(2), and (g)(3) (2005).

In addition to the foregoing, abandonment is defined as follows:

For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child....

Tenn. Code Ann. § 36-1-102(1)(A)(i)(2005).

We first address Father's issue regarding whether the Juvenile Court erred in finding clear and convincing evidence existed to terminate Father's parental rights based upon a new ground alleged in the Supplemental Petition filed only one week prior to trial. The Supplemental Petition sought to add to the Petition an additional ground for termination under Tenn. Code Ann. § 36-1-113(g) for Father's alleged willful failure to visit the Child. Father argues, in part, that the filing of the Supplemental Petition so close to trial failed to provide him with adequate notice of the newly alleged ground for termination and, therefore, violated Father's due process rights.

In its brief on appeal, the State concedes that “the record establishes that [Father’s] work schedule and lack of transportation prevented him from visiting [the Child] in the applicable four month period....” The State agrees in its appellate brief not to pursue on appeal termination based upon a willful failure to visit. Because of the State’s concession, Father’s issue regarding the timing of the filing of the Supplemental Petition is rendered moot. We, therefore, reverse that portion of the Juvenile Court’s May 12, 2006 order that terminates Father’s parental rights upon the ground of abandonment under § 36-1-113(g)(1) for willful failure to visit.

We next address whether the Juvenile Court erred in finding that clear and convincing evidence existed to terminate Father’s parental rights under Tenn. Code Ann. § 36-1-113(g)(1) for willfully failing to support or willfully failing to make reasonable payments toward the support of the Child. In its brief on appeal, the State again concedes that “because the record establishes that [Father] was involuntarily unemployed during the relevant four month period, a wilful failure to support will also not be pursued on appeal.” (citation to the record omitted). Given the State’s concession, we reverse that portion of the Juvenile Court’s May 12, 2006 order that terminates Father’s parental rights upon the ground of abandonment under § 36-1-113(g)(1) for willful failure to support or willful failure to make reasonable payments toward the support of the Child.

We next consider whether the Juvenile Court erred in finding that the State made reasonable efforts to reunite Father and the Child. As this Court stated in *State of Tennessee, Department of Children’s Services v. S.M.D.*:

The State “must make reasonable efforts to preserve a family before seeking to terminate parental rights.” *In re: Jeremy D. and Nathan D.*, No. 01-A-01-9510-JV-00479, 1996 Tenn. App. LEXIS 292, at **7-8, 1996 WL 257495, at *3 (Tenn. Ct. App. May 17, 1996), *no appl. perm. appeal filed*. However, “[r]eunification of a family is a two-way street, and the law does not require DCS to carry the entire burden of this goal.” *In re: R.C.V. and O.V.*, No. W2001-02102-COA-R3-JV, 2002 Tenn. App. LEXIS 811, at *39, 2002 WL 31730899, at *11 (Tenn. Ct. App. Nov. 18, 2002), *no. appl. perm. appeal filed*.

State of Tennessee, Department of Children’s Services v. S.M.D., 200 S.W.3d 184, 197-98 (Tenn. Ct. App. 2006).

Father argues that the State failed to assist him in finding classes so he could learn about the Child’s therapies and needs, and that the State failed to assist him to find stable housing. The record, however, reveals that Father was banned from Children’s Hospital due to his own actions and that Father never even inquired during his visitations with the Child about the Child’s therapies or needs. The record also reveals that Father failed to stay in communication with the State regarding his housing situation. The evidence shows that when he was asked, Father refused to give Ms. Steele the address of the friend with whom Father claimed to be staying. The evidence also shows that Father told Ms. Steele in January of 2006, that he was living in a duplex on Cavalier Road. However, when Ms. Steele attempted to make a home visit to the Cavalier address a couple

of weeks later, she discovered that the place was vacant. The evidence also shows that in July of 2005, Father gave Ms. Steele a bogus address of Blossom Avenue. Even at trial, Father was vague about where he was living and when asked for the address stated: "It's off of - - I don't remember the current address exactly of the street, except for Lay Avenue." Father also admitted at trial that he still gets his mail at Mother's address, even though Mother has an order of protection against him.

"Reunification of a family is a two-way street, ..." and the evidence does not preponderate against the Juvenile Court's finding that the State made reasonable efforts to assist Father given all the circumstances. *In re: R.C.V. and O.V.*, No. W2001-02102-COA-R3-JV, 2002 Tenn. App. LEXIS 811, at *39 (Tenn. Ct. App. Nov. 18, 2002), *no appl. perm. appeal filed*.

We next turn to Father's argument regarding whether the Juvenile Court erred in finding clear and convincing evidence existed to terminate Father's parental rights under Tenn. Code Ann. § 36-1-113(g)(2). In pertinent part, Tenn. Code Ann. § 36-1-113(g)(2) provides that termination may be based upon "substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care...." Tenn. Code Ann. § 36-1-113(g)(2) (2005).

The Plan required, among other things, that Father attend therapy as recommended; obtain and understand information regarding the Child's intensive physical, occupational, and speech therapy; understand the Child's special needs and how to care for the Child; obtain reliable transportation; notify the Child's case manager of any changes in Father's phone number, address, or employment; and pay child support for the Child. The Juvenile Court found that the requirements in the Plan were reasonable and were "related to remedying the conditions which necessitate foster care placement."

The evidence shows that Father did not attend therapy as recommended and that although Father attended some anger management classes, Father was discharged from the classes because of his refusal to take any responsibility for his anger management problems. Father denies he has anger management problems despite the fact that he admitted he broke Mother's ribs, admitted that he got a gun and was going to go after Mother until a friend stopped him, admitted that he reported during his psychiatric assessment that he scares himself when he gets upset and that in the past when he has been angry he blacked out and didn't know what he was doing, admitted that he had once stabbed someone six times when he was angry and was arrested for this incident, and admitted that he has been in jail more times than he can remember for domestic violence and aggravated assault. Instead, Father insists that he was not at fault and stated, "as for going to jail on several different occasions or for the one for aggravated assault, I mean, that's not an anger problem; that's for, one, self defense and for, two, watching television."

The evidence shows that Father has not obtained information regarding the Child's intensive physical, occupational, and speech therapy and does not understand the Child's special needs and how to care for the Child. Father testified he took classes on G-tube feedings when the Child first had the G-tube inserted and that Father was at the hospital with the Child on a regular

basis until Father was banned from Children's Hospital. However, Father admitted that he does not know about any of the exercises or therapies that the Child currently is doing. Father has not sought out any classes or asked any questions to learn about the Child's condition. Father contends that he is unable to take such classes because he was banned from the Children's Hospital premises. Father, however, had other opportunities to learn about the Child's current regimen. Ms. Cormier, who oversaw the visitations between Father and the Child, testified that Father never inquired of her about the Child's medical status, his therapy, or how the Child was doing in the foster home. Ms. Cormier further testified that the Child is fed partially through a G-tube and partially by mouth and that Father never fed the Child during any visits.

The evidence shows that Father has not obtained reliable transportation despite the fact that the Department of Children's Services obtained bus passes for him. Father does not have a valid driver's license because, as Father testified, it "was suspended several years ago for non-payment of fines." However, Father testified that he would attend visitations with the Child at times by illegally driving without a license. In addition, Father admitted that he has gone to jail for driving on a suspended license.

The evidence shows that Father has not obtained a stable residence. Instead, Father testified that he has been in and out of the mission, and that at times he lives with Mother and her husband, Ms. Nancy Shropshire, or with friends. Ms. Steere testified that Father has failed to keep her apprised of his numerous changes of address and that when she attempted to do a home visit of the Cavalier residence Father reported he was living at, she discovered the place to be vacant. Ms. Steere testified that Father later told her that he did not move in because he owed money to KUB, and that he instead was living with a friend. However, Father refused to give Ms. Steere the friend's address. Father testified that he did move into 2442 Cavalier, but that he moved out a mere two months later. Father further testified: "I jump between houses."

The evidence does not preponderate against the Juvenile Court's findings that clear and convincing evidence exists that "[Father] has failed to comply in a substantial manner with those reasonable responsibilities set out in the foster care plans (aka permanency plans) related to remedying the conditions which necessitate foster care placement." We affirm the termination of Father's parental rights to the Child under Tenn. Code Ann. § 36-1-113(g)(2).

We next consider whether the Juvenile Court erred in finding clear and convincing evidence existed to terminate Father's parental rights under Tenn. Code Ann. § 36-1-113(g)(3), which provides:

(3)(A) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(i) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause

the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

Tenn. Code Ann. § 36-1-113(g)(3) (2005).

As discussed fully above, the evidence shows that Father does not have a stable residence. He does not have reliable legal transportation. He is not familiar with the Child's therapies and current needs which, due to the Child's cerebral palsy and lack of early intervention, are many, varied, and labor intensive. The evidence further shows that Father refuses to accept any responsibility for his anger management problem. The evidence preponderates in favor of the Juvenile Court's finding by clear and convincing evidence that the conditions that led to the Child's removal persist, there is little likelihood that these conditions will be remedied at an early date, if ever, and the continuation of Father and the Child's relationship greatly diminishes the Child's chances of early integration into a safe, stable and permanent home. We affirm the grant of termination upon this ground.

Finally, we consider whether the Juvenile Court erred in finding that it was in the best interest of the Child to terminate Father's parental rights. As pertinent to this issue, Tenn. Code Ann. § 36-1-113(i) provides:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

(2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i) (2005).

After reviewing the statutory factors applicable to this case, as well as the Juvenile Court's detailed findings with respect to those factors, we conclude that the Juvenile Court did not err when it found that clear and convincing evidence was submitted to the Juvenile Court that it was in the Child's best interests for Father's parental rights to be terminated.

Conclusion

The judgment of the Juvenile Court is reversed only as to the termination of Father's parental rights under Tenn. Code Ann. § 36-1-113(g)(1) for wilful failure to visit or wilful failure to support or make reasonable payments toward the support of the Child. The judgment of the Juvenile Court is affirmed in all other respects, and this cause is remanded to the Juvenile Court for collection of the costs below. The costs on appeal are assessed against the Appellant, D.A.B., and his surety, if any.

D. MICHAEL SWINEY, JUDGE